

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 03-0148
Sales Tax and Withholding Tax
Responsible Officer
For the Years 2000-2002

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ISSUES

1. Sales Tax and Withholding Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8(f), IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan, 654 N.E.2nd 270 (Ind. 1995).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales taxes

STATEMENT OF FACTS

The taxpayer was an incorporator and secretary of a corporation that did not properly remit collected sales and withholding taxes to the state during the tax period 2000-2002. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the additional sales taxes, withholding taxes, interest and penalty against the taxpayer as a responsible officer. The taxpayer protested the assessment of tax and penalty. A hearing was held and this Letter of Findings results.

1. Sales Tax and Withholding Tax-Responsible Officer Liability

Discussion

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that “In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Pursuant to Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270 (Ind. 1995) at page 273: “The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid.” The factors considered to determine whether a person has such authority are the following:

1. The person’s position within the power structure of the corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

The taxpayer was one of the incorporators and the secretary of the corporation. She was a signatory on the bank accounts. She prepared payment vouchers for the remittance of taxes to the state. She received regular reports from the accountant that should have made her aware of the tax liability. As an example, the 2001 year end statement indicated that the corporation had serious financial problems and had not remitted all of the collected sales taxes to the state. The taxpayer was on notice that the proper taxes were not being remitted. She had the authority to remit those taxes on behalf of the corporation and chose not to. Therefore, she exercised control over the decision of not remitting the trust taxes. In accord with the finding of the Safayan case, the taxpayer had the requisite duty to remit trust taxes to the state. Therefore, she was a responsible officer, personally liable for those corporate taxes.

Finding

The taxpayer’s protest is denied.

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